# 83-350



NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1982

---

International Studio Apartment Association, Inc., and Royal Coast Condominium Association, Inc., Florida Corporations, not-for-profit,

Petitioner,

vs.

Robert E. Lockwood, Clerk of the Circuit Court, Seventeenth Judicial Circuit of Florida, and Broward County,

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE SUPREME COURT OF FLORIDA

---

Counsel of Record:
ROD TENNYSON, ESQ.
LEON ST. JOHN, ESQ.,
Powell Tennyson & St. John, P.A.
Counsel for Petitioners
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

## QUESTIONS PRESENTED

Whether the Clerk of the Court of Broward County, Florida's refusal to return interest earned on funds deposited by the Plaintiff Class Representatives is an unconstitutional taking of property without just compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution in light of this Court's opinion in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 445 U.S. 925, 101 Supreme Ct. 446, 66 L.Ed. 2d 385 (1980).

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES

CONSTITUTION

## GROUNDS ON WHICH JURISDICTION IS BASED

This petition for Writ of Certiorari is brought to review the decree of the Supreme Court of Florida (entered April 14, 1983) declining jurisdiction of the question on review from the Fourth District Court of Appeal of Florida.

Jurisdiction of this Court is conferred to review this decree pursuant to 28 U.S.C. 1257.

## STATUTORY PROVISIONS INVOLVED

Section 28.33 Fl.Stat. (1977) reads in pertinent part:

> All interest accruing from monies deposited shall be deemed income of the Clerk of the Circuit Court investing such monies and shall be deposited in the same accounts as are other fees and commissions of the Clerk's office.

Amendment V, United States Constitution.

> No persons shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, United States Constitution.

> . . . Nor shall any state deprive any person of life, liberty, or property without due process of law.

## STATEMENT OF THE CASE

The action below was brought to recover interest earned on funds deposited in the Broward County, Florida court registry. It is a class action brought by two condominium associations on behalf of themselves and other persons who deposited funds in the court registry. Defendants are the clerk of the circuit court and Broward County, Florida. Appendix p.17.

The case was based upon this Court's recent decision in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 445 U.S. 925, 66 Law Ed. 2d 385, 101 S. Ct. 446 (1980) (hereinafter referred to as Webb's). This case held that if a clerk of the circuit court invested funds held in the court registry and retained the interest earned on those investments, instead of returning them to the owners of the fund, then such activity constituted the taking of property without just compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

---

1. International Studio Apartment Association, Inc. and Royal Coast Condominium Associatin, Inc. are Florida Corporations not for profit, established pursuant to Ch. 118, Fl.Stat. as condominium associations. There are no other affiliated, subsidiary or parent corporations.

The trial court dismissed the Plaintiff's complaint with prejudice, deciding that Webb's should be given prospective, rather than retroactive application. Appendix p.12.

The Plaintiffs took the trial court's decision to the 4th District Court of Appeal of Florida (4th DCA). In its brief, the Appellants argued that the failure to apply Webb's retroactively would constitute an unconstitutional taking of private property without just compensation. Appendix p. 34. This Court's decisions regarding the issue of retroactive application of judicial opinions were discussed. The trial court's position was specifically discredited in the Appellant's brief in light of this federal precedent. Unfortunately, the 4th DCA upheld the decision of the circuit court ruling that Webb's should be given only prospective effect. Appendix p. 24.

The state appellate court reviewed this issue pursuant to federal precedent. It examined the case of Chevron Oil Co. v. Gaines Ted Huson, 404 U.S. 106, 92 Sct. 349 (1971). Chevron established the federal three phase test to determine whether a court decision should have retroactive effect. This test is

> (1) Does the decision "establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed?"

(2) Considering "the prior history of the rule in question, its purpose and effect," does retroactive application "further or retard" the operation of the rule?

(3) Does retroactive application create "injustice or hardship" for one of the parties?

Chevron Oil Company v. Huson, 404 U.S. 106-107, 92 S.Ct. at 355 (1971).

It has been specifically held that all three parts of the test must be found in order to support a prospective application and limit the retroactive effect of a decision. N.L.R.B. v. Lyon and Ryan Ford, Inc., 647 F.2d 745 (7th Cir. 1981); Valencia v. Anderson Brothers Ford, 617 F.2d 1278 (7th Cir. 1980). The circumstances in this case apply to the three part test as follows:

(1) Does the Decision Establish a New Principle of Law, Either by Overruling Clear Past Precedent on which the Litigants may have Relied or by Deciding an Issue of First Impression whose Resolution was not Clearly Foreshadowed?

The 4th DCA found, and the Petitioner admits, that the instant case probably meets the first part of the test in that it involves "an issue of first impression whose resolution was not clearly foreshadowed". Appendix p. 30.

(2) Considering the Prior History of the Rule in Question, its Purpose and Effect, does Retroactive Application Further or Retard the Operation of the Rule?

The principle involved in this decision is the

application of the United States Constitution and its mandate against taking private property for public use without just compensation.

The Appellants argued on appeal that in view of the historically strong Federal judicial stand against government confiscation of private property without just compensation, it would clearly "retard" the operation of the principle if this decision were not applied retroactively. Appendix p.44.

In Webb's this Court held that the interest on the funds deposited in the Registry of the Florida Courts was "private property". The Court noted that:

> The earnings from a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.

Webb's, supra, 101 S.Ct. at 452.

This Court stated,

> . . . (the county) may not transform private property into public property without compensation, even for the limited duration of the deposit in the court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. 101 S.Ct. at 452.

The Taking Clause of the Fifth Amendment would be no "shield" at all "against arbitrary use of governmental power" if county government is not required to return the interest wrongfully taken in this case.

Once this Court had issued its Mandate declaring

the interest from court deposits to be "private property", it was incumbent upon the county government to protect those property rights of its citizens and return the interest wrongfully collected.

Obviously, the key to this issue is this Court's holding that the interest collected is "personal property". Having so held, this case should be viewed in the context of one step in a line of decisions related to the protection of property rights from unconstitutional governmental action. Not to apply this Court's Webb's decision in a retroactive manner would result in allowing a governmental taking of private property without just compensation.

The failure to give Webb's retroactive application would, in fact, "retard" the operation of the principle forcefully set out in the decision itself. Prospective only application of the decision would make a mockery of this Court's pronouncement that the Fifth Amendment "Taking Clause . . . stands as a shield against the arbitrary use of governmental power".

In applying this second portion of the test the 4th DCA found that retroactive application of Webb's would neither further nor retard the rule, stating:

> Here, as in Lemon, even if for the sake of argument a taking is assumed, the constitutional interest is implicated only once and under circumstances that will not recur, the statute having been effectively eliminated. Appendix p.32.

In other words, the state's "dog gets one bite" before liability under the Fifth Amendment accrues. Such logic

has no basis in federal constitutional law.

Clearly, this case fails to meet the second element of the test this Court has devised to determine prospective only application of decisions. Although it is only necessary to fail one part of the three part test to justify a decision's retroactive application, the circumstances of the Webb's decision also fails to meet the following third criteria as well.

(3) Does Retroactive Application Create Injustice or Hardship for One of the Parties?

Most of the leading cases dealing with retroactivity of judicial decisions find "injustice or hardship" because a litigant would have lost a cause of action as a result of the decision. In the Chevron case noted above, this Court ruled that an action for personal injuries on an offshore oil drilling rig was governed by a state's 1-year statute of limitations rather than the federal 4-year statute. Consequently, the decision was specifically held prospective only in order not to unjustly prevent a litigant's right of action under the federal 4-year statute of limitations. This Court said to rule otherwise would produce "substantial inequitable results". Chevron Oil Company v. Huson, supra, 404 U.S. at 108, 92 S.Ct. at 356.

In the present case it is the Plaintiffs who deposited funds in the court registry who will lose a cause of action if Webb's is not held retroactive. Both sides in this case claim that "injustice or hardship" will result if their position is not supported

by this Court. The clerk argues that to apply Webb's retroactively would impose a burden on all taxpayers to repay a few for monies collected and spent in good faith reliance on an act of the Legislature upheld by the highest court of this State. It should be noted that the interest collected went to defray expenses that are the responsibility of all the taxpayers in the county. Furthermore, a separate service fee was charged for handling the deposited funds. Webb's, supra, 101 S.Ct. at 448. Therefore, in point of fact, failure to apply Webb's retroactively would impose a burden on a few citizens(Plaintiffs) for governmental expenses that are the responsibility of all the taxpayers. Another element of "injustice" to either party involves the issue of reliance on the state statute before it was held unconstitutional.

The state courts below emphasized the reasonableness of the clerk's reliance on the state statute, thus focusing on the third phase of Chevron at the exclusion of the others. Obviously, all state and local government employees rely upon state statutes governing their activities until such time as a statute may be declared unconstitutional. To allow the reliance argument to prevail in a case involving an unconstitutional statute related to the activites of local government would be tantamount to giving "prospective only" effect to all decisions declaring such a statute unconstitutional. Such a position implies that the

rule of law is somehow less important than avoiding alleged hardship.

In the case of Simpson v. Union Oil Co. of California, 396 U.S. 13, 90 S.Ct. 30 (1969), this Court held that it was not "unfair" to apply an antitrust decision retroactively because the defendant had a "reasonable basis for believing that its actions were entirely lawful". Id. 90 S.Ct. at 31. Justice Black in his concurring opinion in Simpson stated

> The most elementary conception of justice and public policy requires that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Id. 90 S.Ct. at 32.

In terms of measuring relative "injustice" it would seem unfair to allow county government to rely on the constitutionality of a state statute to the financial detriment of a group of citizens who maintained their good faith reliance that government would not unconstitutionally take property from them. A determination of the injustice or hardship in this case involves the comparative "burden" on the county of returning wrongfully collected funds versus the "burden" on citizens who will be paying considerably more than their fair share to financially support the cost of county government.

The Appellant's petitioned for a writ of certiorari to review the 4th DCA's decision to the Supreme Court of Florida. Appendix p.2. This was summarily denied by that court on Thursday, April 14, 1983.Appendix p.1.

## FEDERAL QUESTION RAISED BELOW

The federal question involved in this petition for writ of certiorari was raised throughout the lower court proceedings. The original complaint below was based upon the claim that the clerk's refusal to refund interest earned on monies deposited violated the Fifth and Fourteenth Amendments of the United States Constitution by depriving the Plaintiff class of its property without due process of law. Appendix p.21.

The trial judge avoided coming to terms with the taking issue by focusing on the tangential and collateral issue of whether Webb's should be given retroactive effect. Appendix p.12.

The taking issue was also raised in the Appellant's main brief to 4th DCA. Appendix pp. 45,47,63. Appellants argued that Broward County's failure to refund the interest earned on funds deposited in the register of the court involved the taking issue directly. In light of the second tier of the Chevron criteria, the Appellants contended that failure to apply Webb's retroactively, and thus refund this money, in fact, retarded the operation of the rule against taking property without just compensation in general. Appellants argued that the taking clause of the Fifth Amendment would be no shield at all against arbitrary use of governmental power if county government is not required to return the interest wrongfully taken in

this case pursuant to this Couts holding in Webb's. Furthermore, not to apply the court's Webb's decision in a retroactive manner would result in allowing a government to take private property without just compensation or due process of law. Finally, this important federal question was also raised by Appellants in the petition for review of the 4th DCA's opinion to the Supreme Court of Florida. Appendix p.7.

## REASONS FOR GRANTING THE WRIT

Tnis Court should accept review of this case and issue a petition for writ of certiorari because the Supreme Court of Florida has taken a position on an important federal question which is in opposition to both federal appellate decisions, as well as, the decisions of this court.

The 4th DCA decided that in this case where private property was taken in violation of federal constitutional mandates, it did not have to be returned to its rightful owners. This Florida decision conflicts directly with federal precedent.

In the case of Webb's Fabulous Pharmacies, Inc., this Court recognized that the interest earned on the funds deposited with the clerk of the circuit court was private property and that it was unconstitutional taking for the Clerk to retain those funds. Webb's, 101 S.Ct. at 452. This Court noted that the Fifth Amendment guarantee ". . . was designed to bar government from forcing some people alone to bear public burdens, which in all fairness and justice should be borne by the public as a whole." Citing Armstrong v. U.S. 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed 2d. 554 (1960), Webb's at 452.

In Webb's, this Court compared the retention of the interest in this case to the appropriation of the use of the air space above the petitioners land

in U.S. v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L. Ed. 1206 (1946). Causby decided that the government's use of the air space above the claimant's land for a flight path for military aircraft was a taking, not merely destroying the property, but using it for the flight of its planes. In the case at hand the Broward County clerk has not only taken, but has, in fact, used the interest earned. See, also Penn Central Transportion Co. vs. New York City, 438 U.S. 104, (1978).

Finally, this Court said that Florida courts could not avoid the constitutional mandate against taking property by simply recharacterizing the principle deposited as "public monies". (Webb's, at 452.) In this same vein, the Florida courts should not be allowed to evade the requirement for paying just compensation upon taking property by simply deciding to apply Webb's prospectively. To do so thwarts the entire purpose of the rule against taking private property, and unjustly benefits the government at the expense of those persons who were compelled to deposit the funds by court order.

The Florida courts below took a position in conflict with this Court's decision in United States v. United States Coin & Currency, 401 U.S. 715, 91 S.Ct. 1041 (1971). In that case, which is very similar factually to the instant case, this Court held that it was unconstitutional to require the forfeiture of property

pursuant to a gambling tax statute previously held unconstitutional. The government argued that the unconstitutional forfeiture statute should not be applied retroactively because over the years the government had seized almost $7,000,000 worth of money and property in reliance on the court's earlier decisions which upheld the validity of the gambling tax requirements. The government stated that it anticipated considerable litigation from people who would attempt to reclaim property seized. Although the government strongly urged that the decision not be given retroactive effect, this Court did not accept the "hardship" argument. Additionally, this Court went on to distinguish retroactivity considerations in procedural matters from those involving constitutional violations, stating;

> Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the fact finding process at trial. . . for we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity.

Id. 91 S.Ct. at 1046. As in Coin and Currency, the present case involves a violation of a fundamental constitutional principle rather than the implementation of a new procedural rule. Thus, Webb's should be applied retroactively. See also United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (1972).

## CONCLUSION

The clerk's refusal to return the interest earned on the funds deposited constitutes a taking. This is the very type of governmental action which the taking clause of the Fifth Amendment and the holding in Webb's was meant to prevent.

The lower courts were confronted with this important constitutional issue, but decided to evade it by imposing the principles of the retroactive/prospective application of judicial decisions. This collateral issue allowed the Florida courts to avoid the taking issue. This Court should grant certiorari in this case becuse the clerk of the court's refusal to return interest earned on deposited funds is an unconstitutional taking of private property which the Floida courts have refused to recognize pursuant to this Court's decision in Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra.

Respectfully Submitted,

ROD TENNYSON, ESQ.
LEON ST. JOHN, ESQ.,
Powell Tennyson & St. John, P.A.
Counsel for Petitioners
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded to Alexander Cocalis, Deputy General Counsel for Broward County, Room 248, County Courthouse, 201 Southeast Sixth Steet, Fort Lauderdale, Florida, 33301, and to David M. Wolpin, Assistant County Attorney for Palm Beach County, Post Office Box 1989, W. Palm Beach, Florida 33402, this 14th day of July, 1983.

POWELL, TENNYSON & ST. JOHN,
P. A.
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

By: Leon St. John
LEON ST. JOHN

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that the Jurisdictional Statement for the Petition of Writ of Certiorari was deposited in the United States Post Office located on Clematis Street, West Palm Beach, Florida, at Four o'clock on July 14th, 1983, first-class postage prepaid, addressed to the Clerk of the Court of the Supreme Court of the United States, Washington, D.C.

LEON ST. JOHN

Sworn to and subscribed
before me this 14th day
of July, 1983.

NOTARY PUBLIC, State of Florida

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires January 30, 1986
Bonded thru Maynard Bonding Agency